Nathalie NORRIS, on behalf of herself and all others similarly situated, Appellee,

v.

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY And Deferred Compensation Plans, State of Arizona, and Richard Rabago; Margaret Griffith; Ted Williams; Russ Webb; Walter Madsen; Dave Conner and Jack La Sota, in their capacity as members of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, Appellants.

No. 80-5372.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 12, 1981

Decided March 11, 1982.

Appeal from the United States District Court for the District of Arizona.

Before GOODWIN and POOLE, Circuit Judges, and NIELSEN,* District Judge.

GOODWIN, Circuit Judge.

The Arizona Governing Committee ["Arizona"] appeals from a summary judgment in favor of the plaintiff and her class ["Norris"]. Relying on *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the court enjoined Arizona from using sex-segregated actuarial tables in its Deferred Compensation Plan and ordered that future annuity payments to female retirees equal the payments to similarly situated men.

* The Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

The summary judgment motions of plaintiff and defendant were argued on stipulated facts. A complete summary of the facts is found in the district court opinion. *Norris v. Arizona Governing Committee,* 486 F.Supp. 645, 647—48 (D.Ariz.1980). Basically, Arizona is authorized by Ariz.Rev.Stat.Ann. § 38—871 to investigate, approve and contract for tax deferred compensation and annuity programs for its employees. Norris' class, which was certified, consists of all female employees of Arizona who have enrolled in, or will enroll in, the plan.

The plan is offered to all employees on a voluntary basis. It is funded entirely by employee contributions. The employees are offered one of three options. First, an employee may elect the lump sum option. This option allows one to withdraw at once all of the accumulated annuity. Second, the employee may elect to receive a fixed sum for a fixed period of time. The third option—the life annuity contract—is the one in question here. The employee may elect to receive a certain amount of money each month for life. Arizona selects the companies with which the employee must contract. All the companies selected by Arizona use sex-segregated mortality tables in computing the monthly amounts due under the life annuity contract.[1]

Norris challenged the plan as violative of Title VII and the Fourteenth Amendment. The district court agreed that the plan violates Title VII. The court held that the plan does not violate

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[1] Essentially, the accumulated money is divided by the number of months which an average person of that sex would live. Because women, as a class, live longer, their monthly payments are smaller. *E.g.*

$$\frac{\text{Accumulated Annuity}}{\text{Life span after Retirement}} = \text{Yearly Payment}$$

$$\frac{\$1000}{10\text{ yrs}} = \$100/\text{yr (M)} \qquad \frac{\$1000}{20/\text{yrs}} = \$50/\text{yr (F)}$$

As Judge Solomon noted in *Henderson v. St. Of Or. By & Through Bur. of Labor,* 405 F.Supp. 1271 (D.Or.1975), in *Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), 84 per cent of women have the same life span as men, yet those 84 per cent received less money than their male counterparts. *Id.* at 1275 n.5.

the Fourteenth Amendment because the discrimination was not intentional. The court enjoined Arizona from using sex-segregated actuarial tables and ordered that future annuity payments to women equal the payments to similarly situated men. We affirm.

A. *Title VII Applies.*

The district court relied extensively on *Los Angeles Dept. of Water & Power v. Manhart, supra.* The pension plan in *Manhart* required female employees to make larger contributions to the fund than male employees. This pension plan was based on sex-segregated mortality tables and Los Angeles' experience that women live longer than men. The pension plan was funded by contributions from both the employees and Los Angeles. It was administered entirely by Los Angeles; no private insurance company was involved.

Manhart found this pension plan unlawful because Title VII forbids discrimination against any *individual* on the basis of sex. *Id.* at 708, 98 S.Ct. at 1375. The court recognized that the plan treated the class of women equal to the class of men (because the present value of the pensions of similarly situated males and females is the same, due to the greater longevity of women). It held, however, that an individual woman cannot be required to take home less pay than a similarly situated man because of stereotypical characteristics of the class of women, which she as an individual may not share.

Los Angeles argued that without the extra charge women employees, as a class, will be subsidized by male employees. The court rejected this argument because the question of fairness to a class is a question for the legislature. Congress, it said, has decided that classifications based on sex are unlawful. *Id.* at 709, 98 S.Ct. at 1376.

Los Angeles also argued that the Bennett Amendment authorized the differential.[2] The court rejected this argument because the pension did not reflect a differential "based on any other factor other than sex." Id. at 712–713, 98 S.Ct. at 1377–1378. The court rejected the argument that the differential was based on longevity because, although there are numerous factors which influence longevity (*e.g.*, weight, smoking, possibly race), Los Angeles relied only on the factor of sex.

The *Manhart* Court concluded its discussion of the validity of the plan by noting that Title VII did not intend to revolutionize the insurance and pension industries. It stated that the holding did not imply that an employer could not set aside equal retirement benefits for each employee and let the employee then purchase the best pension available on the open market.

In *Manhart,* the discriminatory pension plan was compulsory. Here, the plan is voluntary. An employee need not defer compensation. Instead, she may elect to receive her entire compensation each pay-day.

[1] A voluntary benefit offering tax savings is a "privilege" of employment and a "fringe benefit." Thus, this option of the plan is covered by Title VII even though Arizona does not require that each employee participate. *See Peters v. Wayne State University,* 476 F.Supp. 1343 (E.D.Mich. 1979) (Title VII applies even though employee participation is voluntary). Arizona has cited no law to the contrary.

Arizona and amicus American Council of Life Insurance argue that the McCarran-Ferguson Act [the Act], 15 U.S.C.

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[2] The Bennett Amendment allows differentiation based on sex if it is authorized by the Equal Pay Act. The Equal Pay Act allows employers to pay women different wages for equivalent work if it is a "differential based on any other factor other than sex." *Manhart,* 435 U.S. at 712, 98 S.Ct. at 1377.

§ 1011, *et seq.*, prohibits the application of Title VII in this situation. The Act states:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b).

Appellants argue (1) that the use of sex-based mortality tables involve the business of insurance; and (2) Arizona regulates the business of insurance (*see, e.g,* Ariz.Rev.Stat.Ann. § 20–448 prohibiting discrimination in rates). Therefore, Title VII may not be construed to prohibit employers from offering life annuity contracts from private insurers such as those condemned here by the district court.

[2] The fallacy in this argument is that the district court has not interfered with the business of insurance. Title VII has not been construed so as to supersede Arizona's laws. The court has not said that the companies may not use sex-segregated annuity tables. Nor has it joined the companies as defendants or required the companies to pay the adjusted annuities. All the court has done is tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man. As *Manhart* noted, Title VII says nothing about the situation in which a woman takes her money and chooses to purchase an annuity plan using sex-based tables. Title VII governs the relationship between employees and their employer, not between employees and third parties. *Manhart, supra,* 435 U.S. at 718, n.33, 98 S.Ct. at 1380, n.33. *But compare Women in City Govern. United v. City of New York,* 515 F.Supp. 295, 304–06 (S.D.N.Y.1981) (holding that Congress did not intend the McCarran-Ferguson Act to limit Congress' power to enact civil rights legislation that might affect the business of insurance) *with Spirt v. Tchrs. Ins. & Annuity Ass'n,* 475 F.Supp. 1298, 1304 (S.D.N.Y.1979) (hold-

ing application of Title VII to TIAA (a nonprofit legal reserve life insurance company) would supersede New York law, thus it's precluded by the McCarran-Ferguson Act).

B. *The Plan Violates Title VII.*

[3] Arizona argues that to satisfy Title VII Norris must prove that Arizona intended to discriminate against women. It argues that it did not intend to discriminate because it offered the plan in spite of, not because of, the actuarial difference for women.

The short answer to this argument is provided by *Manhart*. *Manhart* required no affirmative showing of intent. Nowhere was the need to prove intent discussed. Instead, the court focused on whether Title VII prohibited the differentials in the pension fund. *See e.g., Manhart* at 711, 98 S.Ct. at 1377: "[The pension] does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Accord Spirt, supra,* 475 F.Supp. at 1310 n.18.

Moreover, this circuit has held that facially discriminatory practices are intentional discrimination for the purposes of Title VII regardless of the subjective motivation. *See Krause v. Sacramento Inn,* 479 F.2d 988 (9th Cir. 1973); *Schaeffer v. San Diego Yellow Cabs, Inc.* 462 F.2d 1002, 1006 (9th Cir. 1972).

Thus, because on their face the practices in question treat men and women differently, Norris need not prove Arizona's animus in adopting the plan.

In *Manhart,* the plan required women to pay more than men into the retirement account. Thus, their take-home paycheck was smaller than similarly situated males. In this case, women who pay in equal amounts receive smaller annuity checks than similarly situated men. Every court that has considered the issue has refused to distinguish *Manhart* because

smaller benefits rather than greater contributions were involved.[3] Thus, this aspect of the plan is not a valid reason for distinguishing *Manhart*.

[4] Arizona also argues that *Manhart* is limited to employer-operated funds. It cites the following language: "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." 435 U.S. at 717, 98 S.Ct. at 1380.

Other language in *Manhart* indicates that the opinion was not confined to employer-operated pension funds:

> "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718 n.33, 98 S.Ct. at 1380 n.33.

The reasoning of *Manhart* is no less persuasive where, instead of operating a plan itself, an employer designates certain companies to operate the plan. In both cases, the plan offered by the company discriminates against women because it looks at them as a class instead of as individuals.

In addition, none of the cases subsequent to *Manhart* has found Title VII inapplicable because an employer-operated pension plan was not involved. *See Equal Employment Opportunity Com'n v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters v. Wayne State University, supra; Spirt v. Tchrs. Ins. & Annuity Ass'n, supra.*

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[3] *Equal Employment Opportunity Com'n v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (equal mandatory pension contribution; women paid less); *Women in City Govern. United v. City of New York*, 515 F.Supp. 295, 298 (S.D.N.Y. 1981) (women pay in more; receive generally unequal monthly annuity or pension checks); *Shaw v. Inter. Ass'n of Machinists & Aerospace Workers*, 24 F.E.P. 995 (C.D.Cal.1980) (BNA) (equal mandatory contributions for joint and survivor annuities, smaller monthly payments); *Sobel v. Yeshiva University*, 477 F.Supp. 1161 (S.D.N.Y. 1979) (equal mandatory pension contributions; women paid less); *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D.Mich.1979) (mandatory retirement plan; women contributed equally but received less); *Henderson v. St. Of Or. By & Through Bur. of Labor*, 405 F.Supp. 1271 (D.Or.1975) (equal mandatory retirement contribution, smaller monthly payments to women).

Arizona attempts to distinguish these cases by stating that those employers took an active role in administering or developing the plan. This distinction is illusory. In this case, as in the above cases, it is clear that the adoption of the plan constitutes active participation without which the challenged program could not operate. *See Colby, supra,* 589 F.2d at 1141; *Sobel v. Yeshiva University,* 477 F.Supp. 1161, 1166 n.4 (S.D.N.Y.1979); *Spirt, supra,* 475 F.Supp. at 1308—09. Arizona made the selection of certain companies as funding media. It approved participation in the plan and deducted the appropriate amount from the employee's salary. The fact that the plan is operated by a private insurance company rather than Arizona does not render *Manhart* less controlling.

Arizona also argues that the district court erred in finding the plan discriminatory because the plan fell within *Manhart's* open market exception. After concluding that Los Angeles' pension plan was discriminatory, the *Manhart* court said:

> "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market...." 435 U.S. at 717—18, 98 S.Ct. at 1380.

Arizona discusses two reasons why it thinks the plan falls within *Manhart's* open market exception. (1) The plan offers other nondiscriminatory options, and (2) the plan only reflects the limits which exist in the marketplace.

[5] Arizona argues that it provided Norris and her class with exactly what was referred to by the Supreme Court. They were given the option of taking their deferred compensation in a lump sum and buying the largest annuity they could find on

the open market. Arizona's amicus stated that simply providing a lump sum distribution option to each participant regardless of sex is equivalent to open market investment opportunities.

This argument is not well taken. The exception suggests that although an *employer* may not offer discriminatory benefits, it may offer equal benefits despite the fact that men and women cannot purchase equal goods with their equal benefits (as per *Manhart*, equal is defined with reference to the individual rather than with reference to the class of women). In other words, the open market exception in *Manhart* says the employer must not discriminate against women, but the employer is not responsible for discrimination against women by third parties.

In this case, it is undeniable that the lump sum option treats men and women the same. But Arizona has also offered a benefit which favors men. It has not merely offered a benefit which will purchase different amounts of goods from a third party. It has cited nothing that indicates that the availability of nondiscriminatory options legitimizes a discriminatory option.

[6] Arizona argues that the plan does not discriminate because it reflects the limits in the marketplace. It argues that the restriction is not of its own making. It cites *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); and *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974).

This argument also misses the mark. Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context. In this case, Arizona overlooks the fact that it specifically adopted the discriminatory plan. Thus this case is not analogous to *Harris v. McRae* (abortion funding case) where the state refused to remove an obstacle to the woman's exercise of her right (*i.e.*, it did not take action to overcome the limits of the marketplace).

In this case, Arizona did not merely refuse to provide an annuity plan to women which treated them equally. It affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against women.

C. *The Propriety of the Award.*

Arizona argues that the district court award was improper. The order permanently enjoined "the defendants from carrying out their obligations under Ariz. Rev.Stat.Ann. § 38—871 *et seq.*, through the use of sex-segregated tables and directing that future annuity payments to female employees who have retired shall be equal to similarly situated male employees."

[7] Arizona argues that this order is an abuse of discretion for two reasons. First, relying on *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), it said that passive abusers, such as Arizona, should not pay. Second, it argues that the order is an abuse of discretion because Arizona taxpayers, through their legislators, indicated in Ariz.Rev.Stat.Ann. § 38—871 that they did not want to pay for the deferred compensation plan.

These arguments are without merit. First, *Manhart* and the cases construing it[4] have allowed recover in substantially similar circumstances. Second, the plaintiffs in *Chastang* recovered; the trustee who merely administered the plan chosen by the employer was not required to pay damages, although it was enjoined. Third, the fact that Arizona did not want to pay for the plan does not insulate it from making payments to equalize the treatment received by women. If this were not the case, a state could insulate itself from Title VII or § 1983 damages merely by saying it did not intend for its taxpayers to be burdened.

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[4] See cases cited in note 3 (excluding *Sobel* which sent the case to trial) and *Henderson* (which was decided before the Supreme Court's decision in *Manhart*).

[8] Arizona's Tenth Amendment arguments also lacks merit. Arizona argues: (1) that even though *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2nd 245 (1976), was limited to the Tenth Amendment's restriction on Congress' commerce power, it might apply to law passed pursuant to Section 5 of the Fourteenth Amendment; and (2) that Title VII was enacted pursuant to the Commerce Clause and thus *National League of Cities* applies. *National League of Cities* does not apply because the Tenth Amendment *only* limits laws passed pursuant to the Commerce Clause. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2nd 614 (1976), clearly holds that the Title VII amendments which extended the Act to state government employees were passed pursuant to Section 5 of the Fourteenth Amendment. The federalism argument cannot be used to prevent prospective damage awards for violation of federal law.

D. *Conclusion.*

Arizona's plan is unlawful under *Manhart*. Title VII applies to these fringe benefits which are offered to Arizona's employees on an optional basis. The existence of nondiscriminatory options does not legitimize the discriminatory option in the plan. This plan does not come within the open market exception in *Manhart* because Arizona did not offer equal benefits to men and women and let them purchase the best option they could on the open market. Finally, the award was proper. It did no more than was authorized by *Manhart*.

Accordingly, the decision is affirmed.

NIELSEN, District Judge, sitting by designation, dissenting:

I believe that Arizona's voluntary Deferred Compensation Plan falls clearly within the *Manhart* open market exception.

Nathalie NORRIS, on behalf of herself and all others similarly situated, Plaintiffs,

v.

ARIZONA GOVERNING COMMITTEE For Tax Deferred Annuity and Deferred Compensation Plans, State of Arizona and Richard Rabago, Margaret Griffeth, Ted Williams, Russ Webb, Walter Madsen, Dave Conner and Jack La Sota, in their capacity as members of the Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans, Defendants.

No. CIV 78-341 PHX VAC.

United States District Court,
D. Arizona.

March 12, 1980.

OPINION

CORDOVA, District Judge.

The plaintiffs and defendants in this case presented to the Court cross motions for summary judgment upon an agreed statement of facts. The stipulated facts are admitted as true for the purpose of the respective motions for summary judgment.

NATURE OF THE CASE

The plaintiff, Nathalie Norris, requests that this case be certified as a class action and filed the same as a female employee of the State of Arizona challenging certain alleged discriminatory aspects of the Arizona Deferred Compensation

Plan ("Plan"). The Plan was adopted by the defendant Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans ("Governing Committee"). The action is filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff contends that because both sexes contribute an equal amount into a retirement account and upon retirement women receive lesser monthly annuity payments than men, that this constitutes discrimination based upon sex and is therefore contrary to the provisions of the Civil Rights Act.

The plaintiff seeks (1) to permanently enjoin the defendants from carrying out their obligations under A.R.S. § 38-871 *et seq.*, through the use of sex segregated actuarial tables, (2) that the Court direct annuity payments to female employees who have retired be made equal to similarly situated male employees, and (3) that this cause be certified as a class action pursuant to Rule 23(b)(2)(3), Federal Rules of Civil Procedure.

FACTS

The stipulated material facts are as follows:

The plaintiff Nathalie Norris is employed by the State of Arizona with the Department of Economic Security. She participates in the State's Deferred Compensation Program adopted by the defendant Governing Committee for tax deferred annuity and deferred compensation plans.

The plaintiff Governing Committee is authorized under A.R.S. § 38-871 to contract for the purposes of establishing tax deferred compensation and annuity programs for employees of the State of Arizona. The defendant State of Arizona is deemed an employer within the meaning of Section 701(b) of Title VII of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(b). The individual named defendants are members of the Governing Committee.

The parties agree that the plaintiff has exhausted her administrative remedies and that the Court has jurisdiction pursuant to 42 U.S.C. § 2000e—5(f) and 28 U.S.C. § 1343.

Pursuant to Rule 23(b)(2), F.R.C.P., the plaintiff's class is alleged to be all female employees who have chosen to enroll in or in the future will choose to enroll in the State Deferred Compensation Plan. The parties agree that as of August 18, 1978 there were 681 women employees of a total of 1,675 participating in the plan. Of the 681 women, 572 had elected some form of future annuity option. As of that same date, 10 women had retired and 4 had elected a lifetime annuity payout.

The Plan is described as follows:

In 1972, Arizona enacted the State Deferred Compensation Plan (A.R.S. § 38-871 *et seq.*). A.R.S. § 38-871 has been amended three times since its original enactment, but none of those amendments have any substantial effect on this litigation. On May 10, 1973, the Governing Committee promulgated rules and regulations which were amended in October of 1974.

The Plan is offered to all state employees on a voluntary basis. There is no employer contribution to the Plan. The benefits to the employee result from immediate tax savings and a promise by the State to ultimately pay the employee a sum of money based upon accumulated values of the employee's account. The Governing Committee made the selection of certain companies as funding media which included life insurance companies with annuity contracts.

One of the options open to the employee is that she may elect to receive a fixed sum for a fixed period of time. The parties agree that all funding media, except the Arizona State Employees Credit Union and the Keystone B4 Mutual Fund, will pay on direction by the Governing Committee a stipulated

periodic amount for a specified period of time. The amount or period of time would be determined by the then present worth of the employee's accumulations during the period of time he or she has been a member of the Plan, divided either by the periodic payment amount requested to determine the length of time such an amount would be paid, or the period requested to determine the amount. These payments would be the same for male or female, assuming all other factors are the same.

However, the parties further agree that for those persons who elect annuity options, the payouts are subject to mortality tables which are published in the contract with the particular company. These payments are calculated on the basis of the present worth of the person's account at the time payments are to begin divided by the months a person of that age and sex is expected to live, and factored by any guaranteed payment period. Because according to the annuity tables females as a class live longer than men as a class, the period of time for which payments are to be made to women would be longer than for men and thus, the periodic payment to women is less than for men. The amounts received are determined by the use of actuarial tables published by the particular company.

The plaintiff, on May 3, 1975, made application to the Governing Committee to participate under the Plan and requested that her monies be invested in Lincoln National Life Insurance Company's fixed annuity contract. Her application was approved on May 9, 1975 and she has been a participant in the Plan since that date. At the time she becomes eligible to receive benefits the options available to her would range from a lump sum payment to an annuity payment based upon the rates published by either the Lincoln National Life Insurance Company or any other funding account which would be in existence at that time.

Assuming the plaintiff does not increase or decrease the amount being deferred by her, and all things remaining equal, the total value of her account at age 65 would be $53,890.93, and the annuity payment that she would receive at that time

would be $320.11 per month for life, with 10 years certain. However, were the plaintiff a male, and assuming all other factors above remained the same, the payment would be $354.07 per month for life, with 10 years certain.

All of the companies participating in the State Deferred Compensation Plan use sex segregated actuarial tables. Although life expectancy is the rationale for using sex segregated mortality tables, other factors affecting longevity, such as smoking habits, alcohol consumption, weight, prior medical history and family history, are not specifically taken into consideration in determining the amount of monthly annuity to be paid. For example, a male who has smoked for 30 years is paid the same as a male who has never smoked. In compiling the mortality table upon which the annuity is based, males who smoked were included with males who never smoked.

DISCUSSION

The program in question is set forth in Article 5, Chapter 5, Title 38, A.R.S., and is labeled "Tax Deferred Annuity and Deferred Compensation Programs". The program is one which provides for deferred compensation and avoidance of income tax on present income.

The Plan is an employee benefit and the effect of participation is set forth in the statute as follows:

> "Any benefits provided pursuant to the provisions of this article shall be in addition to any other benefits provided by law for any employees of this state and shall be supplemental to the provisions of the state retirement system or plan provided pursuant to title 38, chapter 5, articles 2 and 2.1."
> (A.R.S. § 38–874 A)

Additionally, A.R.S. § 38–871 C(1), as amended, directs that any program adopted pursuant to the legislation be operated without cost or contribution from the State, and A.R.S. § 38–872 makes participation voluntary.

The plaintiff's contention is that the Plan is violative of Title VII of the Civil Rights Act.[1]

The use of sex segregated actuarial tables as applied to retirement plans has been held by the United States Supreme Court as violative of Title VII of the 1964 Civil Rights Act. In *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the employer adopted a retirement plan which provided for equal annuity payments for men and women upon retirement, but required larger contributions from women employees. This practice was held by the Supreme Court to be discriminatory and prohibited by the Civil Rights Act.

However, the question before this Court is distinguishable from *Manhart,* hence this Court must consider whether that distinction necessarily dictates a different result. In *Manhart,* it was a retirement plan which was being considered by the Court with mandatory participation by the employee and with females required to pay more into the fund than male employees in order to receive the same monthly payment at retirement. The plan now before this Court is a deferred compensation plan with voluntary participation, with females and males paying the same amount into the fund, and females receiving less in monthly annuity payments at retirement.

As retirement benefits are part of the compensation terms of an employee, and a privilege of employment, the Court must resolve whether a Deferred Compensation Plan is likewise a

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[1] The applicable portion of Title VII, Section 703(a)(1) provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin . . ." (42 U.S.C. § 2000e 2(a)(1))

benefit and a privilege of employment? If so, should the benefit and the privilege to the female employees and the male employees be the same? The Court concludes the answer to both questions to be in the affirmative.

[1, 2] Addressing the question of voluntariness of employee participation in a deferred compensation plan, discrimination against an employee because of sex is violative of Title VII of the 1974 Civil Rights Act whether the employee's participation is voluntary or mandatory, if the discrimination results or may result in a financial benefit, more advantageous conditions of employment, or better or additional privileges to the members of one sex and not the other. The Arizona law in Section 38–874 clearly designates the deferred compensation plan as a benefit in addition to any other benefits provided by law and supplemental to the provisions of the State Retirement System or Plan. The theory of deferred compensation is a clear financial benefit to the employees since it results in reduced taxes on present income. That part of the taxes which are not paid by the employee and result in a tax savings is a monetary saving to the employee. It is unrealistic and illogical to accept the proposition that because a female has the option not to participate that she is not being discriminated against. If she elects not to participate then she will of course not defer her compensation and will have to pay income taxes at the present rate on all her income. She will thereby forego her right to avoid a present tax on the deferred income and pay less tax some years hence when her income is in a reduced amount.

[3] Whereas, in *Manhart,* it was required that female employees make a larger contribution to the pension fund than male employees in order to receive the same monthly payments upon retirement, here both sexes making the same contributions into the deferred compensation plan and selecting the same annuity benefit program receive dissimilar monthly payments in that the female employee receives a lesser amount than the male employee. It is generally accepted that women, as a class, live longer than men. It is equally true that many women do

not live as long as the average man and many men outlive the average woman. The question before this Court, therefore, is the same question that was before the Court in *Manhart*. It is the existence or nonexistence of "discrimination" to be determined by comparison of class characteristics or individual characteristics? The Civil Rights Act makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin". 42 U.S.C. § 2000e—2(a)(1). It logically follows that if the Civil Rights Act is intended to be applied to individuals, then a generalization about a class even if true is an insufficient basis for disqualifying an individual to whom the generalization does not apply.

The defendants' response relies on dictum in *Manhart* wherein the Court stated:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market."

In the footnote the Court warned that Title VII primarily governs relations between employees and their employer, not between employees and third parties. The Court further stated that an employer could not avoid his responsibilities by delegating discriminatory programs to corporate shells. The Plan offered by the State of Arizona does not permit an employee to use his or her accumulated funds and purchase a retirement program in the "open market". To the contrary, the employee must select an option offered by one of the funding media approved by the State. The State Committee selects the funding media which makes the annuity payments. If the employee selects an annuity it is with one of the companies selected by the Committee. The funding media which have entered into the agreements with the State use sex-segregated actuarial tables.

[4] The fact that employees may select an option other than annuity payment, i.e., lump sum distribution, likewise has no bearing on the lawfulness of the plan. Most female employees select the annuity option. In this case, 572 out of 681 female employees so elected. The reason is that the income tax must be paid on the sums as they are withdrawn from that account, and it is to the employee's advantage to spread the tax liability over a number of years rather than paying taxes on the full accumulated amount in one lump sum.

The Indiana Supreme Court rejected the availability of options as a defense to an otherwise discriminatory plan. *Reilly v. Robertson,* 360 N.E.2d 171 (Ind.1977), cert. denied, 434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83 (1977).

> "We are not convinced that the existence of such options render the uneven distribution of benefits under 'A' options constitutionally permissible. From the record we know that 'A' options are selected by the vast majority of all annuitants and that 'B' options are not the functional equivalent of 'A' options."

Again, in *E.E.O.C. v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), the alleged discrimination was "that the ultimate monthly annuity payments to women were smaller than those made to their male counterparts". The Court in *Colby* addressed itself to the applicability of Title VII to a situation where females received smaller monthly annuity payments and found the same discrimination, stating:

> "If the statute's (Title VII) 'focus on the individual' forbids an employer from treating women as a class with respect to annuities so as to require from them higher premiums, . . . it is difficult to perceive a distinction that would permit a plan whereby women make contributions equal to those of men, but receive smaller monthly payments . . . ."

The plaintiff additionally contends that the Plan violates the equal protection clause of the Fourteenth Amendment. A.R.S. § 38—872 refers to state employees, makes no reference to sex, and is not gender-based.[2] Since the Arizona statute is gender-neutral on its face, the Court must then consider whether the classification itself, covert or overt, if not based upon gender results nevertheless in an adverse effect which reflects invidious gender-based discrimination.

[5, 6] It may be arguable that the use of actuarial tables by companies with whom Arizona has contracted constitutes gender-based discrimination violative of the equal protection clause. However, as was pointed out in *Personnel Administrator of Massachusetts v. Finney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), there must be a purposeful discrimination shown before the statute or the program would be found to be offensive to the equal protection clause. These defendants contracted with insurers to provide annuities to participating employees who chose an option, when entitled to benefits under the Plan, where the insurer pays less in monthly payments to females than similarly situated males. From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are the results of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment. The Court finds that it does not.

[7] The Court next considers whether this cause should be certified as a class action pursuant to Rule 23(b)(2), F.R.C.P. In order to certify an action as a class suit, the Court must find

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[2] "Section 38-872

A. State employees may participate in tax deferred annuity and deferred compensation programs established pursuant to the provisions of Section 38-871.

B. Participants in such plans shall authorize their employers in writing to make reduction or deductions in their remuneration as provided in an executed deferred compensation agreement.

that the prerequisites of Rule 23(a) have been met and that the action falls within the three categories of Rule 23(b). Rule 23(a) provides that one or more members of a class may sue or be sued on behalf of a class if:

". . .

1. [T]he class is so numerous that joinder of all members is impracticable;

2. there are questions of law or fact common to the class;

3. the claims of defenses of the representative parties are typical of the claims or defenses of the class; and

4. the representative parties will fairly and adequately protect the interest of the class."

The requirements of Rule 23(a) have been met from the facts stipulated to by the parties.

Rule 23(b)(2) provides that an action may be maintained as a class action where:

"[T]he part[ies] opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

It is clear from plaintiff's complaint and the stipulated facts of the parties that the defendants, "the party opposing the class", have acted or refused to act on grounds generally applicable to the class. In light of the claims of the class, injunctive relief is an appropriate remedy.

The plaintiff class shall consist of all female employees of the defendant State of Arizona who have enrolled in, or in the future will choose to enroll in the State of Arizona Deferred Compensation Plan pursuant to A.R.S. § 38—871 *et seq.*

CONCLUSION

[8, 9] Male and female employees must be treated equally by an employer. Any discrimination against a female employee in respect to compensation, conditions of employment, or privileges of employment solely because of her sex is a violation of Title VII, Section 703(a)(1) of the Equal Employment Opportunity Act of 1974. The administration of the Deferred Compensation Plan of the State of Arizona, which provides or permits smaller monthly annuity payments to a female employee than to a male employee contributing the same amount, is discriminatory and in violation of Title VII of the 1964 Civil Rights Act.

Pursuant to the provisions of Rule 23, Federal Rules of Civil Procedure, this cause may be maintained as a class action. The plaintiff, Nathalie Norris, on behalf of herself and for the class, is entitled to a summary judgment permanently enjoining the defendants from carrying out their obligations under A.R.S. § 38—871 *et seq.*, through the use of sex segregated actuarial tables, and for an order directing that annuity payments to female employees who have retired shall be equal to similarly situated male employees.

§ 38-871. Annuity and deferred compensation governing committee; members; duties

Text as amended by Laws 1973, Ch. 157, § 48.

A. There is established a governing committee for tax deferred annuity and deferred compensation plans which shall consist of the following seven members:

1. Three employees of the state appointed by the governor.

2. The director of the state personnel commission.

3. The superintendent of the state banking department.

4. The assistant director of the department of administration for the division of finance.

5. The attorney general.

B. The governing committee may:

1. Investigate and approve tax deferred compensation and annuity programs which give employees of the state income tax benefits authorized by title 26, United States Code Annotated.

2. In carrying out the purposes of this article, enter into agreements with life insurance companies authorized to do business in this state and with bank trustees or custodians and investment counseling firms registered with the securities exchange commission.

C. The governing committee shall:

1. Arrange for consolidated billing and efficient administrative services in order that any such plans approved shall operate without cost or contribution from the state except for the incidental expense of administering the payroll salary deduction or reduction and remittance thereof to the trustee or custodian of the plan or plans.

2. Promulgate rules and regulations governing the solicitation of employees by persons offering tax deferred compensation or annuity plans to such employees.

§ 38-872. Voluntary participation; authorization

A. State employees may participate in tax deferred annuity and deferred compensation programs established pursuant to the provisions of § 38-871.

B. Participants in such plans shall authorize their employers in writing to make reductions or deductions in their remuneration as provided in an executed deferred compensation agreement.

§ 38-873. Payroll salary deductions; division of finance

The department of administration division of finance shall initiate payroll salary reductions or deductions for the plans adopted pursuant to § 38-871 as directed by each employee participating in such plans.

§ 38-874. Effect of participation

A. Any benefits provided pursuant to the provisions of this article shall be in addition to any other benefits provided by law for any employees of this state and shall be supplemental to the provisions of the state retirement system or plan provided pursuant to title 38, chapter 5, articles 2 and 2.1.

B. Any income deferred under a plan established pursuant to this article shall be included as regular compensation for the purpose of computing the retirement and pension benefits earned by any employee participating in such plan.